per ZBA regulations – including *In re Conners*, 454 A.2d 233 (Pa. Cmwlth. 1983) and *Eaton v. Zoning Hearing Board*, 471 A.2d 919 (Pa. Cmwlth. 1984) – is viewed as settled law.

Petitioner appealed to Commonwealth Court on May 17, 2004, with a notation on the filing papers of "All proceedings to stay," written in a faulty attempt to preserve any possible appellate issue.

On May 21, 2004, Petitioner was ordered by the trial court judge to file a Pa.R.A.P. 1925(b) statement (also known as a "Concise Statement of Matters Complained Of"). Petitioner immediately brought the letter to the attention of his Common Pleas Court case attorney, Methuselah Bradley, IV. On or about June 3, just prior to the date by which the trial court required the statement to be completed, Petitioner again informed this attorney of the deadline. The attorney made a phone call ostensibly to an appellate support service and then told Petitioner words similar to "everything will be taken care of." The 1925(b) statement, however, was never filed. Petitioner now believes that his former attorney deliberately misled him. .

Subsequently, there were two Motions to Quash filed by Respondents and an Answer filed by Petitioner. The Commonwealth Court ruled in a decision on July 9, 2004 that the appeal must be dismissed and the sole reason given was that no 1925(b) statement was filed. Given the text of the Opinion and the nature of the ruling, it is unclear whether the arguments advanced by Petitioner were ever considered by any judge of that Court. One Motion for Reconsideration, filed on July 19, 2004 by the Petitioner in Commonwealth Court, resulted in a second ruling on July 22, 2004, affirming the first.

After uncovering what would appear to be extrinsic fraud committed by the ZBA and others, as well as "fatal defect(s) apparent on face of record" and "other evidence of extraordinary cause justifying intervention by court," pursuant to 42 Pa. C.S.A. §5505, Petitioner filed ***with the***

trial court a Motion for Reconsideration. The trial court, however, considered the filing untimely, even though 42 Pa. C.S.A. §5505 expressly states that the 30-day filing deadline can be waived under such circumstances.

A second Motion for Reconsideration before Commonwealth Court was filed on August 4, 2004 and denied on August 9, 2004.

In a nearly identical case in 2003, *Fairmount Civic Association*, ostensibly led by an almost exclusively white organization, the Fairmount Civic Association, but which included approximately 3 African-Americans (among which was the Petitioner), the same trial court judge ruled in their favor, allowing them a new zoning hearing. In that case and the matter before the Court, a ZBA inspector's report indicated that ***one zoning sign was not properly posted***. (The community represented by the Fairmount Civic Association is almost exclusively white; those impacted by the January 12, 2004 zoning decision in the instant case are almost exclusively African-American.)

In a related matter, the Philadelphia City Council removed the Keystone Opportunity Zone (KOZ) designation from the site of the proposed development in 2003 (Bill 03025200). This effectively removed tax incentives and tax dollars from the surrounding overwhelmingly African-American community that were designed to be used for that community's economic development. There were no meetings in the community to get the approval of the community for this modification. The fact that there was no meaningful community involvement is totally consistent with the 2003 Housing and Urban Development audit which found that the city routinely ignores or mismanages community notification matters wherever HUD dollars are involved. This re-designation, among other things, allows the creation of a block of luxury homes, for market-rate sale, when the former designation would likely have prevented this.

Also relevant is the 2003 removal of the Harris family from a Philadelphia Housing Authority home at 1229 N. 31st Street, also part of that KOZ, for the sole purpose of transferring the land to the developer, Westrum. There is every reason to believe that this was effectively the removal of an impoverished African-American family for the benefit of an upper-income white family to be identified later.

Also, in a related matter, in the same KOZ, beginning approximately February 1, 2004, the city evicted cherished African-American cowboys from three stables so that they could demolish the buildings and turn the land over to the same developer, Westrum. There were no hearings on the matter and at the only community meetings where the topics were mentioned, October 15, 2003 and December 22, 2003, there was massive opposition to this. The city also rejected community plans to purchase the stables and have them run with the cooperation of animal rights consultants. A valuable aspect of the community's identity and vitality was destroyed, without the consent of the community.

The Redevelopment Authority has also decided to take two other properties surrounding the proposed development site using eminent domain, for the sole purpose of transferring them to the developer, Westrum.

2. Federal Questions Raised

All of the federal questions of interest were preserved at the lower levels of these proceedings. In his Response to Motion for Summary Affirmance, submitted to Commonwealth Court, Petitioner wrote:

> ... the Court has all of the information it requires at its disposal ... to affirm that Appellent was ... unable to offer testimony **due to improper notice; and, therefore, that he was denied his right to offer testimony** at the ZBA hearing by the actions of the original petitioner to the ZBA, Westrum Urban, LLC. [Emphasis added.]

In his Motion for Reconsideration and Stay, submitted to Commonwealth Court, Petitioner wrote:

> Appellant has not received **due process** as mandated by statute, the Commonwealth Constitution and the US Constitution. Only by vacating its decision of July 9, 2004 would **Appellant's constitutional rights** be observed. [Emphasis added.]

In his Motion for Reconsideration, submitted to Common Pleas Court, Petitioner wrote:

> In any event, he clearly erred on the most weighty matter before him – the question of notice. As a result, the community was deprived of its **due process and notification rights**. [Emphasis added.]

In his Appellant's Brief, submitted to Common Pleas Court, Petitioner wrote:

> As a result, the community was deprived of its **due process and notification rights**. No decision made by this Zoning Board at the hearing in question should be considered valid. On this basis alone, we ask that the Court deny all motions to quash – already made or yet to be made – and that the Court reverse any zoning variances granted. [Emphasis added.]

No opinion or order by any court or administrative agency addressed any of these constitutional issues directly.

ARGUMENT

I. THE WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE PENNSYLVANIA SUPREME COURT, IN AFFIRMING THE LOWER COURT'S RULING, NEGLECTED TO CONSULT *LEE V. KEMNA*, 534 U.S. 362 (2002), WHICH CLEARLY DEMONSTRATES HOW DUE PROCESS CLAIMS BECOME RELEVANT EVEN WHEN WELL-ESTABLISHED STATE COURT RULES ARE VIOLATED.

The Fifth and Fourteenth Amendments to the U.S. Constitution deny effect to adjudications unless the parties to be heard were given prior notice and an opportunity to participate. ZBA Regulation #3 defines prior notice in a zoning matter in the City of Philadelphia as:

> Notice of an appeal shall be posted by the applicant on each street frontage of the premises with which the appeal is concerned, for at least twelve (12) consecutive days immediately prior to and including the day of the hearing before the Board.

The ZBA inspector's report stated that zoning signs were ***not*** posted for the twelve consecutive days required by ZBA regulations. The community's due process rights, therefore, were violated by the zoning hearing on January 7, 2004 and the results of the zoning hearing must be nullified, by ZBA's own requirements[1]. However, Pennsylvania appellate courts have not addressed this matter on its merits, but adopted a position, under *Lord*, (now, apparently[2], for

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[1] They must also be nullified by ZBA Regulation #17, which states that "A decision of the Board which was obtained as the result of false or concealed information shall vest no rights and shall be set aside."

[2] *Halley* does not indicate whether civil proceedings are covered in it's modification of *Lord* with respect to 1925(b) statements and consistently

civil matters only) that the failure of Petitioner's attorney to adhere to Rule 1925(b) statement is equivalent to a waiver of all appellate questions and rights. Clearly, a strict enforcement of *Lord*, where no exceptions to the filing requirements of Rule 1925(b) are possible in civil matters, will terminate this appeal and, therefore, will deny the Petitioner and his community their due process rights.

This Court has examined a similar matter wherein a state's court rules have the effect of denying due process rights to appellants. In *Lee v. Kemna*, 534 U.S. 362 (2002), the U.S. Supreme Court evaluated whether the Petitioner Remon Lee's violation of two "firmly established and regularly followed" Ohio Rules of Civil Procedure should bar the Court from considering Mr. Lee's federal due process claims. The Court concluded that "the purpose of the Rules was served" by Mr. Lee's actions and allowed Lee's claims to be heard.

Similarly, Petitioner holds that he is in essential compliance with Rule 1925(b) because **he has agreed to limit his questions on appeal to those covered by the trial court's opinion**! There is no need for the trial court to issue a new opinion or review additional matters. Appellate review will proceed as is customary, once a new 1925(b) statement, addressing only trial court opinion matters, had been filed.

Under *Lee*, the Petitioner's violations of Rule 1925(b) have the effect of preserving his due process claims, which, as suggested above, will ultimately be affirmed. Unfortunately, given the realities of today's court dockets, the strict enforcement of 1925(b) under *Lord's* edicts will significantly delay and, therefore, effectively deny justice. In

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refers to issues and remedies for "criminal" matters. Also, the Pennsylvania Supreme Court did not author an opinion in the matter at bar and Petitioner has been unable to locate any new opinions that clarify the matter. It would appear that only criminal defendants are covered by this exception to *Lord*.

fact, this erosion of justice for the Petitioner and his community has already started, since Respondent Westrum has commenced building on the subject property. Further, if Lord is permitted to stand, it will actually lead to a violation of Rule 105, which states in part:

> These rules shall be liberally construed to secure the just, **speedy and inexpensive** determination of every matter to which they are applicable. (Emphasis added.)

Therefore, *Lord* must be modified to ensure that its intent can be weighed by appellate courts, and not merely its edicts, thereby guaranteeing that Petitioner's due process rights and those of his community are protected. This Petition should be allowed by the Court so that this constitutional question can be considered.

II. THE WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE PENNSYLVANIA SUPREME COURT COMMITTED AN EQUAL PROTECTION VIOLATION WHEN THEY REVERSED *LORD* FOR CRIMINAL PARTIES IN *COMMONWEALTH V. HALLEY*, 870 A.2D 795 (PA. 2005), BUT DID NOT EXTEND THOSE PROTECTIONS TO CIVIL PARTIES.

This Court ruled on the matter *Commonwealth v. Halley*, 2005 Pa. LEXIS 603 on March 29, 2005, seven months after Petitioner filed his Petition for Allowance of Appeal and only three weeks prior to their decision in the instant matter. The circumstances of *Halley* are identical to the instant matter in that Halley's counsel never filed a Rule 1925(b) statement. The Court ruled that this represented the sort of actual or constructive denial of assistance of counsel falling within the narrow category of circumstances in which prejudice was legally presumed. The remedy for the

deprivation of the fundamental right to appeal was to restore the right. The Court reversed the order of the lower court and remanded the matter to the Superior Court for reinstatement of the inmate's entitlement to pursue a direct appeal.

In the instant matter, Petitioner's counsel during the lower court proceedings, Methuselah Bradley IV, was unequivocally the attorney of record at the time that the Petitioner was ordered by Common Pleas Court to file a Rule 1925(b) statement. He failed to file a Rule 1925(b) statement.[3]

The question becomes, why did the Pennsylvania Supreme Court not apply the reasoning in *Halley* to its decision in the instant matter?

The only effective difference between the two cases is that *Halley* is a criminal matter and the matter at bar is civil. A review of the case law since *Halley* demonstrates that *Halley* has been applied only in criminal cases.

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[3] Respondents will likely argue that Bradley was not Petitioner's attorney because Petitioner filed the appeal "pro se". This is actually not relevant, however, because, even if this were true, then the Petitioner himself would be the ineffective counsel that should compel relief. With respect to the actual accusation, we note the following.

It is a fact that Petitioner filed his appeal to Commonwealth Court "pro se", but this was on the advice of his counsel. This was bizarre advice, not understood by Petitioner at the time and still not understood by Petitioner. The maneuver was explained by Bradley as "we're gonna fuck with them." ["them" meant the opposition.] In all meaningful ways, Bradley remained the counsel for Petitioner. Bradley represented Petitioner in Common Pleas Court proceedings and filed the various documents on his firm's letterhead. It is unclear there is no Entry of Appearance docket entry on his behalf. But, the docket does demonstrate that the trial court expected him to file documents on behalf of Petitioner.

Petitioner fired Bradley only after his ineffective counsel became apparent – once the significance of his error became clear.

A possible underlying distinction, found in *Halley*, is a reliance on the Sixth Amendment to the United States Constitution, as in:

> Under Pennsylvania law, where there is an unjustified failure to file a requested direct appeal, the conduct of counsel falls beneath the range of competence demanded of attorneys in criminal cases, denies the accused the assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution
> ....

However, a violation of any constitutional protection, including the Fifth and Fourteenth Amendments, is considered so egregious that whenever conspiracy is involved, that action **becomes a criminal matter**. Under 18 USCS §§ 241, which derives from the Civil Rights Act of 1870:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same ... they shall be fined under this title or imprisoned not more than ten years, or both.

Since we charge that the Zoning Board violated our due process rights and the ZBA is comprised of five members, there was, in theory, a conspiracy to deprive us of our constitutional rights, hence 18 USCS §§ 241 applies and we enter the realm of criminal law. The distinction between *Halley* and the instant matter, then, is not in civil vs. criminal law, but in constitutional protections for criminal defendants vs. constitutional protections in **potentially** criminal matters. This effectively borders on a difference without a distinction.

Halley's apparent reliance on the Sixth Amendment to overturn *Lord* for criminal matters **only** is flawed for two additional reasons. First, it favors one constitutional provision (the Sixth Amendment) over another (Fifth and Fourteenth Amendments), but it provides no rationale whatsoever for taking such a course. Second, the apparent weight it gives criminal matters is out of proportion with any constitutional distinction between criminal law and ostensibly civil matters, particularly when one notes the linkages proscribed by 18 USCS §§ 241, per the discussion above.

Petitioner argues that both *Halley* and its more flawed predecessor, *Lord*, produce inherently unconstitutional outcomes and must be expanded so that protections against ineffective counsel, with respect to filing Rule 1925(b) statements, apply both to criminal and civil matters.

III. THE WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE PENNSYLVANIA SUPREME COURT COMMITTED OR EXTENDED DUE PROCESS AND EQUAL PROTECTION VIOLATIONS WHEN IT LET STAND THE ZONING THAT RESULTED FROM A HEARING THAT OCCURRED WITHOUT PROPER NOTICE TO THE COMMUNITY AND THE LEVEL OF ENFORCEMENT OF THAT NOTICE REQUIREMENT (ZBA REGULATION #3) WAS BASED ON THE PREDOMINATE RACE OF A COMMUNITY.

We noted in Argument I that the failure to post the zoning notices was (a) recognized as contrary to ZBA regulations by the ZBA's own inspector; (b) concealed through fraud and deception by the ZBA Chairman at the January 7, 2004 hearing; (c) was a due process violation of the US Constitution. Below, we note additional equal

protection violations and, finally, discuss the implications for the surrounding long-embattled urban community whose rights have been trampled upon.

Adjacent to Petitioner's overwhelmingly African-American community is an overwhelmingly white neighborhood. Three years ago, they were faced with less convincing circumstances regarding zoning notice in a land-use matter. They partnered briefly with Petitioner's community, but were considered by the media to be the major players. The same trial court that ruled against Petitioner and his community in the instant matter, ruled in favor of the white community and the largely white appellants.

Only ineffective council (failure to file a Concise Statement of Matters Complained of on Appeal) by Petitioner's attorney in the matter, Methuselah Bradley, IV, has denied appellate review on the merits of the case by Pennsylvania courts. The denial of appellate review for the sake of total and rigid compliance with a court rule, under *Lord*, that had largely been met by the actions of the Petitioner and under circumstances that did not prejudice the proceedings threatens to make permanent the dire consequences of the due process and equal protection violations.

The specific injuries to Petitioner and his North Philadelphia Empowerment Zone/Enterprise Zone/Keystone Opportunity Zone community include that (a) they will be denied an opportunity to take advantage of desperately needed economic development in this poverty-inflicted G-2 zoned industrial district; (b) they will be forced to subsidize luxury homes built at their very doorsteps through ten years of new construction tax abatements; (c) they will receive dramatic increases in real estate taxes and rental prices that will force massive displacement, particularly among the low-income and elderly; (d) they will experience potentially massive increases in traffic and congestion; (e) they will

experience a deterioration in the health, safety and welfare at a time where native sons and daughters are returning home to help to rebuild this long-suffering North Philadelphia Empowerment Zone/Enterprise Zone/Keystone Opportunity Zone community.

CONCLUSION

Petitioner and his North Philadelphia community were denied due process protection in a zoning hearing, suffered significant equal protection violations in trial court, and now are beginning to experience a massive wave of gentrification that will destroy any opportunity the long-time residents have to rebuild their beloved community. We have not found justice in the Pennsylvania appellate courts due to their reliance on two rulings, *Halley* and *Lord*, that rob civil litigants of recourse from ineffective counsel.

We call upon the nation's highest court to protect our constitutional rights by granting certiorari so that we can – for the very first time – make our case in an unbiased setting.

Respectfully submitted,

A. Alston

Alson Alston, *pro se*

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IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

ALSON ALSTON
Petitioner

v.

CITY OF PHILADELPHIA, ZONING OF ADJUSTMENT AND WESTRUM URBAN LLC,
Respondents

No. 405 EAL 2004

Petition for Allowance of Appeal from the Order of the Commonwealth Court

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ORDER

PER CURIAM

AND NOW, this 19th day of April, 2005, the Application for Stay, Motion to Expedite and Petition for Allowance of Appeal are hereby DENIED.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

ALSON ALSTON
Petitioner

v.

CITY OF PHILADELPHIA, ZONING OF ADJUSTMENT AND WESTRUM URBAN LLC,
Respondents

No. 405 EAL 2004

ORDER

PER CURIAM

AND NOW, this 2nd day of June, 2005, the Application for Reconsideration is hereby DENIED

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

August 31, 2005

Mr. Alson Alston
2836 W. Girard Avenue
Philadelphia, PA19130

Re: Alson Alston
v. City of Philadelphia, Zoning Board of Adjustment, et al.
Application No. 05A213

Dear Mr. Alson:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter, who on August 31, 2005 extended the time to and including October 10, 2005.

This letter has been sent to those designated on the attached notification list.

Sincerely,
William k. Suter, Clerk
by /s/ Heather Trant
Heather Trant
Case Analyst

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

October 5, 2005

Mr. Alson Alston
2836 W. Girard Avenue
Philadelphia, PA 19130

Re: Alson Alston
v. City of Philadelphia, Zoning Board of Adjustment, et al.
Application No. 05A213

Dear Mr. Alston:

The application for a further extension of time in the above-entitled case has been presented to Justice Souter, who on October 5, 2005 extended the time to and including October 20, 2005.

This letter has been sent to those designated on the attached notification list.

Sincerely,
William k. Suter, Clerk
by /s/ Heather Trant
Heather Trant

(5a)

Case Analyst

NOTICE OF DECISION

City of Philadelphia
ZONING BOARD OF ADJUSTMENT
1401 J. F. K. Blvd. - Concourse Level
Philadelphia, PA 19102-2097

APPLICATION #: 030923015
DATE OF DECISION: 1/12/04 CAL #: 03-1780

ATTORNEY: RONALD J. PATTERSON, ESQ.
CARL S. PRIMAVERA, ESQ
PHILADELPHIA, PA 19102

APPLICANT: WESTRUM URBAN, LLC
370 COMMERCE DRIVE
FORT WASHINGTON, PA 19034

OWNER: BREWERY PARK ASSOCS. L.P. &
SLAVKO PROPERTIES, II, INC
3101-31 W. THOMPSON ST
PHILADELPHIA, PA 19121

LOCATION OF PROPERTY 3101-31 W. THOMPSON ST

THIS IS NOT A PERMIT

The Zoning Board of Adjustment, having held a public hearing in the above numbered appeal, after proper public notice thereof, has decided that the request for (a) USE VARIANCE (S) is:

GRANTED

ALL VARIANCES / CERTIFICATES / SPECIAL USE PERMITS GRANTED HEREIN ARE SUBJECT TO THE FOLLOWING CONDITIONS:

1. A PERMIT MUST BE OBTAINED FROM THEDEPARTMENT OF LISCENCES AND INSPECTIONS, PUBLIC SERVICES CONCOURSE, 1401 J. F. K. BLVD, WITHIN ONE CALENDER YEAR FROM THE DATE OF THE DECISION.

2. ALL CONSTRUCTION MUST BE IN ACCORDANANCE WITH PLANS APPROVED BY THE ZONING BOARD OF ASJUSTMENT.

3. A NEW APPLICATION AND NEW PUBLIC HEARING WILL BE REQUIRED FOR FAILURE TO COMPLY WITH THE FOREGOING CONDITIONS.

4. FURTHER CONDITIONS:
****PROVISO: MUST MEET FIRE CODE; CENTRAL AIR CONDITIONING; GARBAGE DISPOSAL IN KITCHEN; COMMERCIAL TRASH PICK-UP; NO CITY TRASH-PICKUP; REMOTE METERS OR BOX IN METERS.****

By Order of the ZONING BOARD OF ADJUSTMENT
ELEANOR M. DEZZI, Sec

NOTE: All appeals from the decision are to be taken to the Court of Common Pleas of Philadelphia County within 30 days from the date and the decision.

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY
FEBRUARY TERM, 2004

ALSON ALSTON
Appellant

v.

ZONING BOARD OF ADJUSTMENT
OF THE CITY OF PHILADELPHIA

No. 000967

FINDINGS OF FACTS AND CONCLUSION OF LAW OF THE ZONING BOARD OF ADJUSTMENT

The above-named Appellant takes this appeal from the decision of the Zoning Board of Adjustments of the city of Philadelphia ("Zoning Board of Adjustment"), in Calendar No. 03-1780, granting a request for a zoning variance of property located at 3101-31 West Thompson Street, Philadelphia Pennsylvania (collectively referred to as "subject property"). The Zoning Board of Adjustment hereby makes the following Finding of Facts and Conclusions of Law as provided by law.

FINDINGS OF FACTS

1. On October 28, 2003, Ronald Patterson, Esquire and Carl Primavera, Esquire, on behalf of their client, Westrum Urban LLC, filed with the department of Licenses and Inspections (L&I) an application for a zoning and use permit for the subject property to demolish all existing structures

and construct seventy-two (72) attached, four (4) story, duplex family residential dwellings for a total of 144 single family residential dwelling units: each unit having one garage parking space: private streets and courtyard/common area by easement; all on one parcel. Council also filed an Accelerated Review Request. (Application for Zoning Permit and / or Use Regulation Permit, Application No. 030923015, and Accelerated Review Request).

2. On November 2, 2003, L&I issued a Notice of Refusal of Permit of Application Number 030923015, refusing the use permit because one hundred forty four (144) dwellings are prohibited in the district; and two hundred sixteen (216) parking spaces are required to be provided for these structures. The Notice of Refusal of Permit references Section 14-508 of the Zoning Code. (Notice of Refusal of Permit, Application No. 030923015).

3. The owner of the subject property is Brewery Park Associates, L.P. and Slavko Properties, II, Inc. (Petition of Appeal, Calendar No. 03-1780).

4. On November 24, 2003, Ronald Patterson, Esquire, on behalf of his client, Westrum Urban, LLC, filed a Petition of Appeal to the Notice of Refusal of Permit from L&I, arguing that literal enforcement of the Zoning Code would cause unnecessary hardships upon the property and the Applicant, and the proposed use for the property will not adversely affect the public health, safety, welfare or traffic in the area. (Petition of Appeal, Calendar No. 03-1780).

5. The subject property is located in a G-2 industrial district. The property borders Master Street on the north, Thompson Street on the south, 31st Street on the east and 32nd Street on the west. It is surrounded by industrial properties. The subject property was previously used as a warehouse for

Acme stores, and has been vacant for about seven (7) years. (N. T. 4-5)

6. Applicant propose to develop the subject property in conjunction with Mayor Street's NTI Program, by building one hundred forty four (144) stacked townhouse dwellings with the same number of parking spaces. Applicant further proposes that parking will be serviced by private driveways and the interior street frontages will allow for on-street parking. The property will have private trash pickup and snow removal; there will be a homeowner's association to maintain the property; the dwellings will have central air; and the property will meet the fire code. (N. T. 3, 6-8)

7. Applicant represented that there have been various meetings sponsored by Kevin Hanna, Secretary of Housing and Neighborhood Preservation for the city of Philadelphia and City Councilman Darrell Clarke, and Applicant has worked with the community group, the Philadelphia Housing Authority, the Redevelopment Authority and the Planning Commission concerning this project. (N. T. 6)

8. Applicant submitted a packet on information detailing the proposed use of the property, including floor plans of the proposed dwellings, and a copy of the Zoning Notice that was to be posted in the neighborhood, giving notice of the public hearing in front of the Zoning Board of Adjustment. (N. T. 3)

9. A public hearing was held before a quorum of the of the Zoning Board of Adjustment's members on January 7, 2004. (N. T. 1)

10. The Zoning Board of Adjustment heard and considered testimony from Robert Rosenthal, Vice President of Westrum Development, who confirmed the accuracy of

the description of the proposed use of the subject property by Applicant's counsel. (N. T. 8)

11. The Zoning Board of Adjustment herd and considered testimony from Robert Irons, an engineer from Bohler Engineering, Inc., who also confirmed the accuracy of the description of the proposed use of the subject property by Applicants council. (N.T. 9)

12 Mr. Ron Seiboth, an architect with Martin Architectural Group, who prepared the floor plans and architectural plans for the subject property, was also present at the hearing. (N. T. 9)

13. The Zoning Board of Adjustment heard and considered testimony from Seth Shapiro, a principal of Westrum Development, who testified that the electric boxes for the units are planned to be placed in an alcove for B units, subject to approval from PECO Energy. Mr. Shapiro also confirmed that there will be private trash collection at the subject property, to be maintained by the homeowner's association. (N. T. 10-11)

14. The Zoning Board of Adjustment heard and considered testimony from Zenobia Harris, a staff person with Councilman Clarke's office, who represented that the councilman supports the proposed use of the subject property. (N. T. 13)

15. The Zoning Board of Adjustment also heard and considered testimony from Melvin Smith, a staff person with Councilman Clarke's office, who attended many of the meetings with Westrum and the community residents with regard to this development. Mr. Smith testified that there was a meeting in October regarding the proposed use, and there are other proposed projects in the area which will allow for a

mix of properties, attracting mixed income residents. (N. T. 13-14)

16. The Zoning Board of Adjustment heard and considered testimony from James Hudson, a resident at 2931 West Harper Street, who opposed the proposed use of the subject property until further community discussion about the zoning notice. The Chairman of the Zoning Board of Adjustments informed Mr. Hudson that an inspector went out to the area on December 29, 2003, and reported that the zoning noticed was posted, and there was no problem with the posting of the zoning notice. Mr. Hudson reiterated his request for more community discussion, particularly about the stables. (N. T. 15-16).

17. The Chairman of the Zoning Board of Adjustments informed Mr. Hudson about the City's plan to construct one hundred (100) new stables in the City of Philadelphia. (N. T. 16).

18. The Zoning Board of Adjustments also heard and considered the recommendation of Paula Brumbelow, from the City Planning Commission, who represented that the proposed use in accordance with the redevelopment goals for the area, and the requested variance should be granted with the notation that the plans will need final engineered subdivision approval from the Planning Commission. (N. T. 17-18)

19. The Applicant's proposed use is not apposed by persons in the neighborhood of the subject property as evidence by letters which were received by the Zoning Board of Adjustments. (Letters addressed to the Zoning Board of Adjustments from: Councilman Darrell Clarke and Kevin Hanna, Secretary of Housing and Neighborhood Preservation for the City of Philadelphia).

20. A Majority of the Zoning Board of Adjustments voted to approve the requested use variance with the provisos that the subject property must meet Philadelphia Fire Code, central air conditioning, garbage disposals in the kitchen, commercial trash pickup, no City trash pickup, and no remote meters or boxed-in meters. On January 12, 2004, the Zoning Board of Adjustment issued a Notice of Decision granting the request for a use variance. (Notice of Decision, Cal No. 03-1780).

CONCLUSIONS OF LAW

1. The issue before the Zoning Board of Adjustment is a request for a variance to allow the proposed use, one hundred forty four (144) dwellings development with one hundred forty four parking spaces, to be located at the subject property, which is situated in a G-2 industrial district.

2. The Zoning Board of Adjustment finds that proper notice of the hearing was provided to the public, pursuant to the report of the inspector who went out to the area on December 29, 2003, and saw that the zoning board was posted, and there was no problem with the posting. See §14-1805(7) of the Zoning code.

3. The Zoning Board of Adjustment shall consider a request for a variance pursuant to §14-1802 of the Zoning Code. The Applicant has a duty to submit evidence relating to the criteria set forth in this section of the Zoning Code. §14-1802(8).

4. The criteria considered by the Zoning Board of Adjustment to determine whether a use variance shall be granted includes (1) whether a unnecessary hardship will result if the variance is not granted that is unique to the

property, and (2) whether the proposed use is contrary to the public interest. *Valley View Civic Ass' v. Zoning Board of Adjustment,* 501 Pa 550, 462 A.2d 637 (1983) (citations omitted). The burden of proving these elements is on the Applicant. *Id.* The Zoning Board of Adjustment has considered the evidence submitted and determined that the Applicant has met its burden of proof.

5. The Applicant has met its burden of proof, and has demonstrated that an unnecessary hardship will result if the use variance is not granted, because the subject property is not appropriate for industrial use, as evidence by the fact that the property has remained vacant for a significant period of time.

6. The Applicant has further demonstrated that a grant of the requested use variance would not be contrary to the public interest. Particularly, the testimony of Zenobia Harris and Melvin Smith from Councilman Clarke's office, that the Councilman supports the proposed use; and the proposed use will bring a mix of properties and attract individuals with mixed incomes to the neighborhood, indicates that the proposed use will benefit the area.

7. Since the proposed use meets the applicable requirements for granting a variance, the Zoning Board of Adjustment approves the Applicant's request for a use variance.

Respectfully submitted,
/s/ Robert G. Pili
Robert G. Pili
Administrator
Zoning Board of Adjustment

Vote of the Zoning Board of Adjustment

David L. Auspitz	YES, must meet Fire Code, central air conditioning, garbage disposal in kitchens, commercial trash pickup, no City trash pickup, remote meters for boxed-in meters
Judith Eden	YES, proviso as above
William E. Hall	YES, proviso as above
Eleanor M. Dezzi	YES, proviso as above
Samuel Staten	YES, proviso as above

CITY OF PHILADELPHIA, LAW DEPARTMENT
By Peter J. Gonzales
Assistant City Solicitor
Attorney Identification No. 91819
1515 Arch Street – 16th Floor
Philadelphia, PA 19102-1595
(215) 683-5208

IN THE COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

ALSON ALSTON
Appellant,

v.

ZONING BOARD OF ADJUSTMENT, CITY OF PHILADELPHIA, and WESTRUM URBAN, LLC
Appellees.

STATUTORY APPEAL

FEBRUARY TERM
No. 000967

ORDER

AND NOW this 29th day of April, 2004, upon consideration of the Appellees City of Philadelphia and Westrum Urban, LLC's Motion and Memorandum of Law, and any reasons thereto, it is hereby ORDERED and decreed that the motion to quash Appellant's appeal is GRANTED, and the appeal in the above-captioned matter is DISMISSED with PREJUDICE.

BY THE COURT

/s/ [illegible]

IN THE COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY
FIRST JUDICAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

ALSTON
vs.
ZONING BOARD OF ADJUSTMENT

FEBRUARY TERM, 2004 NO. 0967

ORDER

Pursuant to Pa. R. A. P. 1925(b), you are **ORDERED** to file a concise statement of the matters you actually intend to raise on appeal to the Commonwealth Court by June 4, 2004.

This statement shall be filed as follows: Original to Civil Appeals Unit, Room 266 City Hall: copy to Honorable Matthew D. Carrafiello, 673 City Hall, Philadelphia, PA 19107 by June 4, 2004. A copy should also be sent to all interested parties.

BY THE COURT
/s/ MATTHEW D. CARRAFEILLO
MATTHEW D. CARRAFEILLO, J

Date: May 21. 2004

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
COURT OF COMMON PLEAS
JUDICIAL CHAMBERS

673 CITY HALL
PHILADELPHIA, PA 19107
(215) 686-2961/62

MAY 21, 2004

Alson Alston, pro se
2836 W. Girard Avenue
Philadelphia, PA 19130

RE: Alston vs. Zoning Board of Adjustment
C. P. #0402-0967

Dear Council:

The attached Order requiring you to file a Concise Statement of Matters Complained of on Appeal was filed on May 21, 2004

Your prompt attention to this matter is appreciated.

Very truly yours,
/s/ Anthony Pappagallo
Anthony Pappagallo, Law Clerk to
Judge Matthew D. Carrafiello

AP/mjm
cc: Richard C. Demarco, Esq., 260 S. Broad Street,
Philadelphia, PA 19102

Peter J. Gonzales, Esq., 1515 Arch Street, 16th Floor, Philadelphia, PA 19102

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY FIRST JUDICIAL DISTRICT OF PENNSYLVANIA CIVIL TRIAL DIVISION

PHILADELPHIA COUNTY
COURT OF COMMON PLEAS
CIVIL DIVISION

ALSON ALSTON
Plaintiff
v.
ZONING BOARD OF ADJUSTMENT
OF THE CITY OF PHILADELPHIA,
Defendant

February Term, 2004
No. 967

OPINION

MATTHEW D. CARRAFIELLO, J. June 11, 2004

Alson Alston ("Alston") appeals this Court's Order dated April 29,2004 granting the City of Philadelphia (the "City") and Westrum Urban, LLC's ("Westrum") motions to quash Alston's appeal from the adjudication of the Zoning Board of Adjustment (the "Board") made on January 12, 2004 granting a request for a zoning variance.

Westrum filed with the Department of Licenses and Inspection ("L&I") an application for a zoning and use permit for property located at 3101-31 West Master Street in

Philadelphia. L&I denied Westrum's application. Westrum then appealed L&I's decision to the Board. On January 7, 2004, the Board scheduled a hearing, but Alston did not attend the meeting to raise his objections to Westrum's appeal.

On January 12, 2004, the Board granted Westrum's request for a zoning variance. Alston's appealed the Board's decision. Westrum then filed motions to squash Alston's appeal and to compel Alston to post bond. On April 8, 2004, the City filed an emergency motion to squash Alston's appeal.

On April 29th, 2004, this Court granted the City's motion and dismissed the matter with prejudice. Alston's now appeals this Court's April 29, 2004 Order with Commonwealth Court.

On May 21,2004, Alston was ordered to file a Concise Statement of Matters Complained of on Appeal pursuant to Pa R.C.P. 1925(b) by June 4, 2004. As no 1925(b) Statement has been filed to date, Alston has waived all issues. Pursuant to *Commonwealth v. Lord*, 553 Pa. 415, 719 A.2d 306 (1998), Alston's appeal should be QUASHED.

As to the merits of this case, Alston's appeal should be denied because Alston lacks standing to bring his appeal in that he did not attend the January 7, 2004 Board meeting to raise objectives to Westrum's appeal. See *Leoni v. Whitpain Township Zoning Hearing Board, 709 A. 2d 999 (Pa. Cmwlth. 1998), appeal denied, 557 Pa. 642, 732 A.2d 1211 (1998)* (finding that a person lacks standing to appeal a boards decision when the person failed to object or appear in any way in zoning board proceedings); §14-807(1) of the City of Philadelphia Zoning Code (as amended June 1, 1998) (allowing any person that entered an appearance in zoning

board proceedings to intervene as of right in an appeal before the zoning board).

Furthermore, Alston lacks standing as a taxpayer since he did not appear at the January 7, 2004 Board hearing. (§14-1807 of the City Zoning Code allows standing to a person or entity as a taxpayer; *Society Created to Reduce urban Blight (SCRUB) v. Zoning Board of Adjustment of the City of Philadelphia, 729 A. 2d 117 (Pa. Cmwlth. 1999)*

BY THE COURT:
/s/ MATTHEW D. CARRAFIELLO
MATTHEW D. CARRAFIELLO, J

IN THE COMMONWEALTH COURT OF
PENNSLYVANIA

Alson Alston
Appellant

v.

Zoning Board of Adjustment

No. 1070 C.D. 2004

PER CURIAM **ORDER**

NOW, July 9, 2004, upon consideration of the City of Philadelphia's motion to dismiss, Wesrtum Urban, LLC motion to quash, and appellant's response thereto, and it appearing from the trial court's docket entries that appellant failed to file a concise statement of matters (as ordered by the trial court on May 21, 2004), the motion to dismiss and motion to quash are granted. *Commonwealth v. Lord*, 719 A.2d 306 (Pa.1998).

IN THE COMMONWEALTH COURT OF
PENNSLYVANIA

Alson Alston
Appellant

v.

Zoning Board of Adjustment

No. 1070 C.D. 2004

PER CURIAM **ORDER**

NOW, July 22, 2004, upon consideration of appellant's motion to stay all proceedings and appellant's motion for reconsideration and stay of all proceedings, the motions are denied.

IN THE COMMONWEALTH COURT OF
PENNSLYVANIA

Alson Alston
Appellant

v.

Zoning Board of Adjustment

No. 1070 C.D. 2004

PER CURIAM — ORDER

Now, August 9, 2004, upon consideration of appellant's petition for reconsideration of single judge order, the petition is denied.

IN THE COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION, CIVIL SECTION

ALSON ALSTON
Appellant,

V.

CITY OF PHILADELPHIA
ZONING BOARD OF
ADJUSTMENT,

CITY OF PHILADELPHIA,

WESTRUM URBAN, LLC,
Appellees.

February Term 2004
Docket No, 0967

RE ZBA Calendar No. 03-1780
3101-31 W. Thompson Street

ORDER

AND NOW, this 21 day of July, 2004, upon consideration of Appellant's Motion for reconsideration and responses thereto, if any, it is hereby ORDERED and DECREED that petitions to quash the ORDERS of April 29, 2004, and May 21, 2004, as well as the OPINION of June 11, 2004, is denied in that petition is ultimately filed and ordered is final and has been appealed.

BY THE COURT:
/s/ [illegible]
7-21-04
CARRAFIELLO, J

COPIES SENT PURSUANT TO [illegible] 236(b)
JUL 23 2004
First Judicial District of Pa.
User I.D.: /s/ [illegible]

INTENTIONALLY BLANK
[Substitute with Zoning Inspector's Report – reverse side, which is blank]

To: Boards Staff
From: Robert J. D'Agostino, Adm. /s/ RJD
Sub: Revised ZBA Regulations

Attached is a copy of the revised ZBA Regulations. Please read them to become familiar with them. The changes that you should be most concerned with are as follows:

II. Hearings before the Board
6. Photographs must be at least 4" X 6"

11. (a) a party cannot have anyone represent them at the Board other than an attorney-at-law authorized to practice within the Commonwealth of Pennsylvania.

Architects, Engineers, Expediters and contractors cannot represent a party at the Board. They can be a fact witness. That is, they can testify to anything they did such as drawing the plan, filing the application, taking the photographs.

(b) Civic Associations having a interest may appear with legal counsel or a duly authorized officer or member thereof.

This means that a Civic Association even if its incorporated does not have to be represented by an attorney

(c) Corporations having an interest must be represented by an attorney- at-law authorized to practice within the Commonwealth of Pennsylvania. This applys even to non-profit corporations.

Regulations Governing Practice Before
The Zoning Board of Adjustment
of the City of Philadelphia
(Effective June 21, 1999)

I. APPEALS TO THE BOARD

1. Appeals to the board shall be taken within thirty (30) days from the date of the order, requirement, decision, or determination which is the subject of appeal.[4]

2. Appeals to the Board shall be taken on the forms provided by the Board and shall set forth:

(a) The name and address of the appellant and, if represented by counsel, of appellant's attorney and the attorney's telephone number:

(b) The appellant's interest in the controversy;

(c) A brief description of the property with which the appeal is concerned;

(d) The application number under which the administrative officer's order, requirement, decision, or determination was made;

(e) The date of the order, requirement, decision, or determination appealed from; and,

(f) A brief, itemized statement of the factual and legal grounds for appeal and of the relief which is sought.

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[4] Amended effective 1/16/91

3. Notice of an appeal shall be posted by the applicant on each street frontage of the premises with which the appeal is concerned, for at least twelve (12) consecutive days immediately prior to and including the day of the hearing before the Board. Such notice shall be clearly visible to the public and legible from the public right of way, shall be on the forms provided by the Board, and shall contain, in legible print, all the information therein required. No appeal which requires a public hearing shall be heard until proper posting has occurred. Such posted notices shall be promptly removed after the day of the hearing.

4. In appeals where the appellant is not in possession or control of the subject premises, the Zoning Board may waive the posting requirements stated in Regulation No. 3. In such cases, the Zoning Board will impose such alternative notice requirements as are designed to provide effective notice to all interested parties.

II. HEARINGS BEFORE THE BOARD

5. Hearings shall be conducted in the presence of a quorum of the Board, which shall mean at least four (4) members in attendance. In the absence of a quorum, the hearing shall proceed unless any party shall object. In the event of objection, all hearings as to which an objection is made shall be rescheduled, with due notice given; but the members in attendance may, in their discretion, receive such evidence as is offered, which shall be made part of the record when the matter is later heard.

6. At the hearing before the Board, the applicant must submit proof of legal or equitable interest in the property in question, such as a fully-signed deed, agreement of sale, lease, or other similar instrument. All deeds must show a copy of the stamp affixed by the Recorder of Deeds as evidence of its recording. If the

applicant is a joint owner or joint lessee, the applicant must present written evidence of authority signed by all owners or lessees. In addition, the appellant must submit clear photographs, not less than four inches by six inches (4"x 6")[25] of each side of the premises with which the appeal is concerned. The photographs must show the posted zoning notice(s) and the entirety of all structures on the premises, along each street frontage and any structures on the immediate adjoining properties. In appeals involving changes to the side(s) or the rear of premises, photographs showing the entire affected side(s) or rear must also be submitted. Each photograph shall be dated, bear the name and address of the photographer, and a brief description of the photograph.

7. (a) At the hearing before the Board, the applicant may be required to submit such additional information as the Board may request, in its discretion, including but not limited to a plan drawn to scale, showing:

(1) The dimensions of the lot in question;

(2) The location, elevation and interior and exterior dimensions of all existing and propose structures on the lot in question; and

(3) The existing and proposed uses of those structures.

(b) At the hearing before the Board, the applicant shall inform the Board of all applications of any nature which have been made or filed by or for the applicant with any governmental department, board, commission, authority, agency or official, relating to the premises in question. The applicant shall advise the Board of any decisions, actions, permits or notices made with reference to such applications. The applicant

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[5] Amended effective 6/21/99

shall also advise the Board of any notices of condemnation which have been issued relative to the subject premises, and whether the premises are located in a certified Redevelopment Area. In all cases where subdivision approval of the City Planning Commission is required, the applicant shall present to the Board proof of such approval.

8. Whenever practicable in hearings before the Board, the applicant's evidence shall be presented first; thereafter protestants will be heard.

9. All exhibits introduced into evidence at the hearing shall be premarked with the name of the offering party and numbered sequentially in the order in which use is anticipated.

10. All witnesses (including parties) shall be required to take an oath or solemn affirmation before giving testimony to the Board.

11. (a) Any party may appear before the Board in person, or by an attorney-at-law authorized to practice within the Commonwealth of Pennsylvania.[6]

(b) Any civic association, neighborhood group or other such entity having an interest in any manner may appear by such legal counsel or by a duly authorized officer or member thereof.[7]

(c) Any corporation having an interest in any matter shall appear in person represented by an attorney-at-law authorized to practice within the Commonwealth of Pennsylvania.[8]

(d) Any partnership having an interest in any matter may appear before the Board by one of its partners by providing written authorization from the General Partner and/or

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[6] Amended effective 6/21/99
[7] Amended effective 6/21/99
[8] Amended effective 6/21/99

Managing Partner to represent the partnership at the hearing or by an attorney-at law authorized to practice within the Commonwealth of Pennsylvania.[9]

12. The Board may require the submission of proposed findings of fact, conclusions of law, and/or memoranda of law, and such submissions shall be filed with the Board within ten (10) days of the date of the request, unless otherwise specified by the Board.

III. DECISIONS OF THE BOARD

13. In making its decisions, the Zoning Board may take official notice of information that is contained in its own files and in the files of the Department of Licenses and Inspections, or that is otherwise a matter of public record, although such files may not have been introduced into evidence at the hearing.

14. A decision of the Zoning Board shall relate only to the zoning law and shall not be construed to apply to any other law, except insofar as authorized by statute or ordinance.

15. In matters where a quorum was not present for the hearing, any absent members participating in the decision shall certify in writing that they have read the full record before participating in the decision.

16. Except by special permission of the Board, no hearing or rehearing will be permitted, after a final determination by the Board or by a Court on appeal therefrom, for one (1) year from the date of such final determination. The grant of a new hearing or a rehearing shall not act as a stay of any enforcement action by the Department of Licenses and Inspections.[10]

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[9] Amended effective 6/21/99

[10] Amended effective 6/21/99

17. A decision of the Board which was obtained as the result of false or concealed information shall vest no rights and shall be set aside.

IV. APPEALS FROM THE BOARD

18. The date on which a decision of the Board is filed shall be conclusively presumed to be the date of adjudication, and the time for appeal shall run from that date. The Board shall give prompt written notice of its decision to the applicant and to all parties who entered an appearance in writing before the Board.

19. A request for rehearing or reconsideration shall not stay the time for taking an appeal from a decision of the Board. If rehearing or reconsideration is granted by the Board; any appeal taken before that date shall have no effect. In such cases, the time for appeal shall run from the date of the issuance of the Board's decision following the rehearing or reconsideration.

20. In all appeals from the Board, the appellant shall within three days of the filing of the appeal, serve on the Board and on the City Solicitor both a date-stamped copy of the Notice of Appeal as filed with the Prothonotary and a copy of the Board's letter announcing the decision from which the appeal is taken.

V. CONSTRUCTION

21. These Regulations shall supersede all previous Regulations of the Board.

EXCERPTS of Petitioner's Application for Stay before Pennsylvania Supreme Court

Illustrating Zoning Board's Misconduct

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1. A ZBA inspector issued a report on December 29, 2003, indicating that the zoning notices were NOT posted. **(Please see Exhibit 2.)** This is incontrovertible evidence that the notices for the hearing were not posted for twelve consecutive days prior to the January 7, 2004 hearing, as required by ZBA Regulation #3, and, therefore, neither the Petitioner nor the greater community had statutory notice of said hearing.

2. At the January 7, 2004 hearing, there was unassailable evidence of misconduct committed by the ZBA and attorneys for Respondent Westrum. These prejudiced both the zoning proceedings and trial court proceedings and, if this Application for Stay of All Proceedings is not granted, those prejudices will be made permanent. We begin with the fact that, at the January 7, 2004 zoning hearing, ZBA Chairman David Auspitz stated that a ZBA inspector was present at the site on December 29, 2003 and that "he or she did not have any problem with the posting notice." (Please see p. 15, line 13 of **the transcript of hearing, attached as Exhibit 3.**) Mr. Auspitz clearly was referring to the inspector's report. Otherwise, why would he specifically mention December 29, 2004? And, yet, he read the report incorrectly – or he deliberately misrepresented the contents, knowing that only such a misrepresentation would permit the hearing to continue, pursuant to ZBA Regulation #3. Note that Mr. Auspitz follows up his initial remarks with "If there is a posting problem, yes, we understand ...." (Please see p. 15, lines 22-23 of the transcript.) He gives the impression here that he is acknowledging that there was a posting issue, however, he uses the hypothetical "if". So, effectively, he does <u>not</u> acknowledge

anything – and his initial denial of a posting problem stands. Supporting this interpretation is his final statement "but we purposely send somebody out to check every property." (Please see p. 15, lines 23-24 of the transcript.) The "but" serves to oppose the immediately preceding hypothetical and firmly stakes out the position that there was no posting problem.

3. In the absence of any other evidence about what the Chairman knew, these series of statements raise questions about the Chairman's competence, his integrity or both. In any event, he clearly erred on the most weighty matter before him – the question of notice. As a result, the community was deprived of its due process and notification rights. No decision made by this Zoning Board at the hearing in question should be considered valid, especially considering ZBA Regulations #3 and 17.

4. And, yet, most astonishingly, we are now in possession of other evidence that clearly demonstrates that the ZBA Chairman knew and actually acknowledged that there was a posting problem, but that he conspired with Mr. Carl Primavera, attorney for Respondent Westrum to overlook the issue, contrary to ZBA Regulation #3, so that the hearing could continue. This is all exquisitely, concisely and irrefutably contained in a second transcript which we have obtained from the January 7, 2004 hearing, covering the first few moments of the afternoon session, perhaps two hours before the Westrum case was heard. In it, the following dialogue occurs (please see p. 4, lines 2 - 19 of the **second transcript, Exhibit 4**):

> CHAIRMAN AUSPITZ: 3101 to 31 West Thompson Street. **There was a posting problem.** (Emphasis added.)
>
> MR. PRIMAVERA: **Yes.** (Emphasis added.) For the record, Carl Primavera. I'm here on behalf of the applicant. We have photos showing the original posting. They were removed, I guess, during the holidays, and we

requested additional posters from the Board, and the property has been reposted. The Councilman's office has been involved in community groups as well.

CHAIRMAN AUSPITZ: **We will hear the case in its turn.** (Emphasis added.)

MR. PRIMAVERA: Thank you.

STENOGRAPHER'S NOTE: **Posting problem portion** (emphasis added) for 3101 to 31 West Thompson Street adjourned at 2:15 PM.

5. From their own mouths, both ZBA Chairman Auspitz and Mr. Primavera, Esquire stated that they were aware that the hearing notices had not been properly posted, hence the use of the term "posting problem" by the Chairman and the "Yes" by Mr. Primavera. And, yet, Mr. Auspitz stated that the ZBA "will hear the case" anyway, in clear violation of ZBA Regulation #3. Later, when the case is heard, Mr. Auspitz denies that there was a posting problem, apparently confident that no members of the community had been present at the beginning of the afternoon session (a correct assumption, based on all information available to Petitioner). We can now dispense with the notion that Mr. Auspitz was merely mistaken when he referred to the December 29, 2003 inspector's report during the hearing proper. If the choice was that he was either mistaken or he was deliberately concealing the inspector's findings, then the latter must now be considered the only reasonable conclusion.

6. Further, Mr. Primavera, an officer of the court, stood by and allowed this deceit – the false statements about the zoning inspector's report and about there being no posting problem – to occur during the hearing proper. Of course, he had earlier

(29a)

CALENDAR NUMBER	ADDRESS
03 1780	3101-31 WEST THOMPSON STREET

☐ POSTED	☒ NOT POSTED	HEARING DATE	DATE INSPECTED
		7 JANUARY 2004	29 DECEMBER 2003

DESCRIPTION

LOTS with building being DEMO

NOTE

3101-31 WEST THOMPSON STREET E 30

ROSE MARY WOOD

INSPECTOR'S INITIALS: RW

51-068

ZONING BOARD OF ADJUSTMENT
INSPECTOR'S REPORT

DEPARTMENT OF
LICENSES & INSPECTIONS

participated in the conspiracy to ignore ZBA Regulation #3, so he is far more complicit than mere silence would suggest.

7. In addition to these two men, all other attorneys present on behalf of Respondent Westrum, the other ZBA commissioners, employees of the ZBA, employees of Westrum, witnesses from Councilman Darrell Clarke's office and witnesses for Westrum, to the extent that they were present at both the beginning of the session and the actual hearing in which Mr. Auspitz fraudulently claimed that there was no posting problem and Mr. Primavera never rose to object to the fraud, are also participants in this fraud and deception.

[Please note that the Exhibits indicated above follow.]

EXCERPTS of Petitioner's Application for Stay before Pennsylvania Supreme Court

Exhibit 2

The Zoning Inspector's report contained in Exhibit 2 of the Application for Stay is found on page 29a of this petition for writ of certiorari.

EXCERPTS of Petitioner's Application for Stay before Pennsylvania Supreme Court

Exhibit 3
Relevant portions of Zoning Board Transcript #1,
Wednesday, January 7, 2004
Approximately 3 or 4 PM

CHAIRMAN AUSPITZ: Did you gentlemen want to -

MR. HUDSON: Yes, My name is James Hudson. I live at 2931 West Harper Street. I'm a resident of the community.

I'd like to oppose this project until we have further community discussion about the zoning notice. I just heard about that, the zoning, and -

CHAIRMAN AUSPITZ: We sent an inspector out; as we do in all cases , and we have no report. It was posted. On December 29th the inspector was out there, and he or she did not have any problem with the posting notice. So there was knowledge to the community that way.

MR. STATEN: You have a Council representative here.

CHAIRMAN AUSPITZ: And there were previous meetings, too, just so you understand. If there's a posting problem, yes, we understand, but we purposely send somebody out to check every property.

MR. HUDSON: Okay. I'm sorry, but I just wanted more community discussion before we do the stables. We might be losing something valuable to the community.

CHAIRMAN AUSPITZ: The stables? Can I tell you something? I'm the biggest fan of the stables in the City of Philadelphia. All right? And not only do I know about the 60 new stables, but we're trying to get 140 more to make a hundred new stables. Are you involved in that program?

MR. HUDSON: No.

CHAIRMAN AUSPITZ: It's a fabulous program.

MS. HARRIS: Thank you.

CHAIRMAN AUSPITZ: And we're also asking the governor if there's a way he can tie horse insurance into your automobile insurance so that we can have more places in Philadelphia where horses can be, because if we have 200 people riding through Fairmount Park, nobody is going to touch a jogger, nobody is going to mess with anybody. All right? And it's a great thing. After school, these kids go there and they muck the stables they get instruction.

The polo team was just mentioned in the newspaper two days ago, and we have a Pegasus program going for kids who have problems, and

they ride, and it seems to be a great benefit to them also.

So we're ahead of you. Trust me, those horses are going to be happy and the people that ride them are going to be happy. All right? I'm sure these developers have an interest in seeing that, too.

MR. PRIMAVERA: That's correct. And this is an ongoing process.

MS. HARRIS; Yes, it is.

CHAIRMAN AUSPITZ; That's a safe bet. Anything else? Any other gentlemen? Are we okay? That' s what you' re here for. We're glad you came up. That's the idea. Feel free.

EXCERPTS of Petitioner's Application for Stay before Pennsylvania Supreme Court

Exhibit 4
Relevant portions of Zoning Board Transcript #2,
Wednesday, January 7, 2004
Approximately 2:00 PM

CHAIRMAN AUSPITZ: I call this session of the Philadelphia Zoning Board of Adjustment to order. Everybody please rise and raise your right hand.

(All sworn)

CHAIRMAN AUSPITZ: Obviously we have to have total silence in the room. The rest of the Board will be out in a minute, but ,I wanted to get started on time, and that way, we can do the continuances and withdrawals or whatever.

In the package you received you were asked to bring deed, photograph, proof of ownership. If you don't have those things with you, please see our administrator, who is sitting to my right.

If you're a corporation, you must be represented by an attorney. If you don't have an attorney, we have to continue the case. So please don't decide you're an LLC, or whatever you are. This is not the day to play, trust me. So if you're a corporation, come back, again with an attorney. We look forward to it.

Just so everybody understands the process, we're going to call the address of the property, you come up front, stand behind the table. If you're in opposition to that particular property, you come up at the same time. We'll take it from there. What's going to happen is, the court reporter is going to get your name and address. The Planning Commission is going to ask for the photograph, deed, proof of ownership, and then we'll hear the case. So all you have to do is, when you hear your address, come up front, stand behind there. That's the entire procedure.

We don't care if you keep your cell phones on. We only ask if you get a call, to please go outside and answer it, for the obvious reasons, and no outgoing calls. But I repeat again, no conversation in the room. If you have to talk, please go outside.

Are there any continuances or withdrawals?

(Continuances and withdrawals heard.)

CHAIRMAN AUSPITZ: 3101 to 31 West Thompson Street. There was a posting problem.

MR. PRIMAVERA: Yes. For the record, Carl Primavera. I'm here on behalf of the applicant.

We have photos showing the original posting. They were removed, I guess, during the holidays, and we requested additional posters from the Board, and the property has been reposted. The

Councilman's office has been involved in community groups as well.

CHAIRMAN AUSPITZ: We will hear the case in its turn.

MR. PRIMAVERA: Thank you. (Posting problem portion for 3101 to 31 West Thompson Street adjourned at 2:15 p.m.)

No. 05-858

In The
Supreme Court of the United States

Alson Alston,
Petitioner,

v.

City of Philadelphia Zoning Board of Adjustment,
Westrum Urban, LLC,
Respondents.

On Petition for Allowance of Appeal
To The Pennsylvania State Supreme Court

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI ON BEHALF OF THE PETITIONER ALSON ALSTON

Alson Alston
2836 W. Girard Avenue
Philadelphia, PA 19130
(215)769-3333 Fax:(215)769-0806

QUESTIONS PRESENTED

1. Do rulings by the Pennsylvania Supreme Court *since* the filing of Petitioner's Petition for Writ of Certiorari ***explicitly*** deny neighbors in zoning matters due process protections, under the Fifth and Fourteenth Amendments to the United States Constitution, when either they or their attorneys commit non-prejudicial violations of Pa. Rule of Appellate Procedure 1925(b)?

PARTIES TO THE PROCEEDINGS

The parties are the same as indicated in the Petition for Writ of Certiorari.

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No. 05-858

In The
Supreme Court of the United States

Alson Alston,
Petitioner,

v.

City of Philadelphia Zoning Board of Adjustment,
Westrum Urban, LLC,
Respondents.

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CITATIONS OF REPORTS OF OPINIONS BELOW

The United States Supreme Court, denying certiorari on March 20, 2006, did not issue an opinion. All other citations are the same as indicated in the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

This Petition asks the Court to reconsider its order of March 20, 2006, which denied certiorari in this matter. This Petition is filed within twenty-five (25) days of the March 20, 2006 decision and is based on grounds limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented, thereby meeting the requirements of Supreme Court Rule 44.1 and 44.2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides, in relevant part:

> No person … shall be deprived of life, liberty, or property, without due process of law….

The Fourteenth Amendment provides, in relevant part:

> No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Philadelphia Zoning Board of Adjustment ("ZBA") Regulation #3 states, in part:

> Notice of an appeal shall be posted by the applicant on each street frontage of the premises with which the appeal is concerned, for at least twelve (12) consecutive days immediately prior to and including

the day of the hearing before the Board. ... **No appeal which requires a public hearing shall be heard until proper posting has occurred.** [Emphasis added.]

ZBA Regulation #17 states:

A decision of the Board which was obtained as the result of false or concealed information shall vest no rights and shall be set aside.

Pa. Rule of Appellate Procedure 1925(B) states:

Direction to file statement of matters complained of. The lower court forthwith may enter an order directing the appellant to file of record in the lower court and serve on the trial judge a concise statement of the matters complained of on the appeal no later than 14 days after entry of such order. A failure to comply with such direction may be considered by the appellate court as a waiver of all objections to the order, ruling or other matter complained of.

STATEMENT OF THE CASE

Petitioner argues that the rigid adherence to Pa.R.A.P. 1925(b) by Pennsylvania Courts denies communities in zoning matters due process.

In numerous cases before Pennsylvania courts[1] since the filing of the Petition for Writ of Certiorari on October 20,

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[1] *Commonwealth v. Castillo, 888 A.2d 775, 780 (Pa. 2005)* will be discussed in detail. In the interest of brevity, several other cases recently decided, will not be discussed. They include: *Ctr. City Residents Ass'n (CCRA) v. Zoning Bd. of Adjustment of Phila., 2006 Pa. LEXIS 51 (Pa. 2006)* (Petition for Allowance of Appeal denied due to late filing of Rule 1925(b) statement, lower court rulings against appellants affirmed); *Commonwealth v. Holtzapfel, 2006 Pa. Commw. LEXIS 150 (Pa. Commw. Ct. 2006)* (Appeal denied due to late filing of Rule 1925(b) statement; *Commonwealth v. Schofield, 888 A.2d 771 (Pa. 2005)*

2005, the harm has been manifest and acknowledged by the courts themselves. However, Pennsylvania courts hold to *Commonwealth v. Lord, 719 A.2d 306 (Pa. 1998)* and *Commonwealth v. Butler, 571 Pa. 441, 812 A.2d 631 (2002)* to justify inherently unjust and unconstitutional decisions. These rulings are opposed to *Lee v. Kemna, 534 U.S. 362 (2002)*, which clearly demonstrates how due process claims become relevant even when well-established state court rules are violated. In the instant matter, the resulting injury to Petitioner and the community he represents (in his capacity as president of a business and civic association) is the very destruction of that community through gentrification and the obvious, unassailable due process violations by the city government.

These federal questions were raised by Petitioner in his filings to Common Pleas Court, both of his motions and briefs to Commonwealth Court, his petitions and applications to the Pennsylvania Supreme Court, and his Petition for Writ of Certiorari before this Court. No court or administrative agency has addressed them directly.

BACKGROUND - INTERVENING CIRCUMSTANCES OF SUBSTANTIAL EFFECT IN PENNSYLVANIA COURTS

On December 29, 2005, the Pennsylvania Supreme Court decided *Commonwealth v. Castillo, 888 A.2d 775, 780 (Pa. 2005)*. In that matter, the court directly considered whether it should modify its earlier *Lord* and *Butler* decisions. Those decisions held that a failure of an appellant to file a concise statement of matters complained of, pursuant to Pa.R.A.P. 1925(b), results in an automatic waiver of all issues on appeal. In *Castillo*, the court reaffirmed these prior decisions.

(Uncertain filing date of Rule 1925(b) statement resulted in waiver of all appellate issues for *pro se* litigant).

Of particular note is the court's statement regarding remedies when, as in the instant matter, ineffective counsel is responsible for the Rule 1925(b) violation:

> While the resulting **waiver may appear harsh**, we note that the harshness is alleviated by the ability of criminal defendants to seek relief by challenging the effectiveness of their counsel and **civil defendants to file malpractice actions**. [Emphasis added.]

ARGUMENT

THE WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE PENNSYLVANIA SUPREME COURT, IN *CASTILLO*, DENIES COMMUNITIES DUE PROCESS PROTECTIONS IN ZONING MATTERS WHERE THERE IS INEFFECTIVE COUNSEL.

The *Castillo* ruling is of substantial effect in the instant matter because the matter at bar is an appeal of a zoning case. Therefore, a malpractice claim, as recommended by the Pennsylvania Supreme Court, ***cannot remedy the harm caused***. Specifically, a malpractice claim against Petitioner's former counsel, Methuselah Bradley, IV, would not even ***slow*** the pace of a noxious development undertaken by Respondent Westrum.

Since the only mitigation against the self-admitted "harshness" of the *Lord* and *Butler* rulings is unavailable to the Petitioner in the instant matter and to all communities in zoning matters, the result of *Castillo* is that only its "harsh" qualities present themselves. A community is forever deprived of zoning code protections for the sake of a rule. This is clearly not just.

Even worse, in the instant matter, is that this is an appeal of a zoning case in which the community ***never*** received statutory notice of the zoning hearing. A zoning inspector's report attests to that fact. (Please see p. A26a of the Appendix of the Petition for Writ of Certiorari.)

However, at the hearing, the Zoning Board chairman lied about said notice. (Please see pp. A40a – A45a of Petition for Writ of Certiorari.) Had he acknowledge that there was insufficient notice, he would have been prevented from hearing the case, pursuant to ZBA Regulation #3. His misrepresentation about notice led directly to the approval of the applicant's permit to build luxury condominiums in one of the city's poorest neighborhoods. Petitioner's community is now the victim of accelerating gentrification and its inherent displacement.

The Fifth and Fourteenth Amendments to the U.S. Constitution deny effect to adjudications unless the parties to be heard were given prior notice and an opportunity to participate.

The ZBA inspector's report stated that zoning signs were ***not*** posted for the twelve consecutive days required by ZBA regulations. The community's due process rights, therefore, were violated by the zoning hearing on January 7, 2004 and the results of the zoning hearing must be nullified, under the Fifth and Fourteenth Amendments, as well as by ZBA Regulation #17.

Failure of this Court to accept certiorari will condemn the Petitioner and his community to a permanent loss of their due process rights in this matter and will ultimately support the requisite displacement that the applicant's project will cause.

As noted in the Petition for Writ of Certiorari, this Court has examined a similar matter wherein a rigid interpretation of a state's court rules have the effect of denying due process rights to appellants. In *Lee v. Kemna*, the U.S. Supreme Court evaluated whether the Petitioner Remon Lee's violation of two "firmly established and regularly followed" Ohio Rules of Civil Procedure should bar the Court from considering Mr. Lee's federal due process claims. The Court concluded that "the purpose of the Rules

was served" by Mr. Lee's actions and allowed Lee's claims to be heard.

Similarly, Petitioner holds that he is in essential compliance with Rule 1925(b) because **he has agreed to limit his questions on appeal to those covered by the trial court's opinion.**

CONCLUSION

Petitioner and his North Philadelphia community were denied due process protection in a zoning hearing and now are beginning to experience a massive wave of gentrification that will destroy any opportunity the long-time residents have to rebuild their beloved community. The Pennsylvania Supreme Court, in its December 2005 *Castillo* ruling, makes it abundantly clear that there is a "harshness" to its order. This Petition demonstrates that such injury ***cannot*** be alleviated for protestants in zoning matters and, therefore, is innately prejudicial.

We call upon the nation's highest court to protect our constitutional rights by granting certiorari so that we can – for the very first time – make our case in an unbiased setting.

Respectfully submitted,

Alson Alston

Alson Alston, *pro se*